

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

FILMED

MAR 13 1991

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IN THE MATTER OF THE APPLICATION)	
FOR BENEFICIAL WATER USE PERMIT)	FINAL ORDER
NO. 71324-76M BY CHARLES M.)	
DESCHAMPS)	

* * * * *

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written exceptions were received. Therefore, having given the matter full consideration, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the January 23, 1991, Proposal for Decision, and incorporates them herein by reference.

WHEREFORE, based upon the record herein, the Department makes the following:

ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Application for Beneficial Water Use Permit No. 71324-76M is hereby granted to Charles M. Deschamps to appropriate 320 acre-feet per year of the waters of Butler Creek by means of a headgate at a point in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 3, Township 13 North, Range 20 West, for irrigation purposes and 3.4 acre-feet of water a point in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ of said Section 3, for stock watering purposes. The places of use for irrigation shall be 70 acres in the SE $\frac{1}{4}$ and 55 acres in the NE $\frac{1}{4}$ of Section 4; 25 acres in the W $\frac{1}{2}$ W $\frac{1}{2}$ NW $\frac{1}{4}$ and 10 acres in the W $\frac{1}{2}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of

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Section 3, all in Township 13 North, Range 20 West, Missoula County. The place of use for the stock water is the N $\frac{1}{2}$ of said Section 3. The period of appropriation and use for irrigation shall be February 1 through June 1, inclusive of each year. The period of appropriation and use for stock watering shall be January 1 through December 31, inclusive of each year.

A. This permit is subject to all prior and existing water rights, and to any final determination of such rights as provided by Montana law. Nothing herein shall be construed to authorize appropriations by the Permittee to the detriment of any prior appropriator.

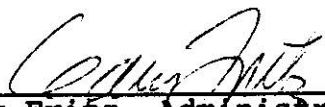
B. The Permittee shall keep a written record of the flow rate and volume of all waters diverted from Butler Creek, including the period of time, and shall submit said records to the Department upon request. The Permittee must be able to admeasure the water used from Butler Creek separate from the water used from the Grass Valley French Ditch. This condition is being applied to this permit until quantification through permit verification occurs. Upon verification of this Permit, the greatest amount of flow rate diverted will be placed on the Applicant's water right.

C. Issuance of this Permit shall not reduce the Permittee's liability for damages caused by the exercise of this Permit, nor does the Department, in issuing the Permit, acknowledge any liability for damages caused by the exercise hereof even if such damages are a necessary and unavoidable consequence of same.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of the Final Order.

Dated this 21 day of February, 1991.



Gary Fritz, Administrator
Department of Natural Resources
and Conservation
Water Resources Division
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6605

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record at their address or addresses this 21st day of February, 1991 as follows:

Charles M. Deschamps
8150 Mullan Road
Missoula, MT 59802


Paul A. and Natalie L. Hanson
and Paul Allen Hanson
Hanson Ranch
8255 Butler Creek
Missoula, MT 59802

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Vivian A. Lighthizer,
Hearing Examiner
Department of Natural
Resources & Conservation
1520 East 6th Avenue
Helena, MT 59620-2301


Cindy G. Campbell
Hearings Unit Secretary

FILMED
FEB 1 1991

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) PROPOSAL FOR DECISION
NO. 71324-76M BY CHARLES M.)
DESCHAMPS)

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on November 28, 1990, in Missoula, Montana.

Applicant Charles M. Deschamps appeared at the hearing in person and by and through counsel, Jack Tuholske.

Barry Dutton, President of Land and Water Consulting, appeared at the hearing as a witness for the Applicant.

Douglas Miller, local farmer and rancher, appeared at the hearing as a witness for the Applicant.

Lee Yelin, Water Right Consultant with Land and Water Consulting, appeared at the hearing as a witness for the Applicant.

Betty Deschamps, mother of the Applicant, appeared as a witness for the Applicant.

Nancy Deschamps, wife of the Applicant, appeared as a witness for the Applicant.

Objectors Paul A. Hanson, Natalie L. Hanson, and Paul Allen Hanson appeared at the hearing in person and by and through counsel, Dexter Delaney.

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Michael P. McLane, Field Manager of the Missoula Water Resources Division Field Office of the Department of Natural Resources and Conservation, hereafter Department, appeared at the hearing.

EXHIBITS

Applicant's Exhibit 1 is a hydrograph of Butler Creek based on the 1985 "Snow Bowl Study", also known as the "Wittingham Report".

Applicant's Exhibit 2 is a copy of the "Snow Bowl Study," consisting of 89 pages.

Applicant's Exhibit 3 consists of two pages. The first page is a letter from Barry L. Dutton to the Applicant. The second page is a copy of a part of the Northwest Missoula Quadrangle map which has been enhanced to show the location of Butler Creek, the locations of springs in Butler Creek and the Deschamps home.

Applicant's Exhibit 4 consists of copies of two ASCS aerial photos which have been mounted on a large poster board.

Applicant's Exhibit 5 is the Northwest Missoula Quadrangle map mounted on a large poster board.

Applicant's Exhibit 6 consists of four photographs of the Applicant's reservoir and the stream identified by letters "A" through "D". All pictures were taken on May 9, 1990.

Objectors' Exhibit A consists of 46 pages containing copies of Objectors' and Applicant's existing water rights.

The Department file was reviewed by all parties who had no objection to the contents as long as the Objector's Responses to

Interrogatories (which had not been received when the Examiner left Helena) were placed in the file upon her return. Thus the file was entered into the record in its entirety including the aforementioned responses.

Objectors Hanson requested the Hearing Examiner take administrative notice of that part of the record In re Application G(W)45422-76M by Paul A. and Natalie Hanson d/b/a as Hanson Ranch concerning Objectors Hanson's existing water rights. Applicant had no objection, therefore she agreed to do so.

PRELIMINARY MATTERS

The record was left open until December 28, 1990, for filing of simultaneous briefs, then until January 8, 1991, for response to said briefs. On December 28, 1990, Applicant's counsel requested a one-day extension for the brief filing. Counsel for Objectors consented to the extension which was verbally granted by Jack Stults, a Hearing Examiner with the Department, in the Hearing Examiner's absence. Said brief was received by the Department on January 2, 1991. Objectors' brief was received by the Department on December 31, 1990. Both parties' reply briefs were received on January 8, 1991.

Applicant's Statements of Fact 1, 2, 4, 5, 6, 7, 8, 12, 13, 14, 15, 16, 17, 19, 20, 21, and 22 were incorporated into the Examiner's Findings of Fact. Statement of Fact 3, except the last sentence (which was incorporated) is not relevant to the instant case nor are Statements of Fact 9, 10, 11, and 18.

Objectors' Proposed Findings of Fact I, IIB, IIIa, IIIB (except the last sentence), IIIC, and IIID (except the last sentence) were incorporated into the Examiner's Findings of Fact.

Objectors' Proposed Finding of Fact IIA, that the Applicant is attempting to revive a water use right which he previously abandoned, was incorporated somewhat, however, the connotation that Applicant thought he could somehow revive the old water was omitted. Applicant acknowledged that only the Water Court is able to "revive" a water right presumed to be abandoned by failure to file a timely Statement of Claim.

The record does not support Objectors' Proposed Finding of Fact IIC, IID, IIE, nor IIF.

Objectors' Proposed Finding of Fact IIIa and IIIB (except the last sentence), IIIC, and IIID (except the last sentence) were incorporated into the Examiner's Findings of Fact. The record does not support the last sentence of IIIB nor of IIID.

FINDINGS OF FACT

1. Section 85-2-302, MCA, states in relevant part, "Except as otherwise provided in (1) through (3) of 85-2-306, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or distribution works therefor except by applying for and receiving a permit from the department."

2. Charles M. Deschamps filed the above-entitled Application with the Department on June 1, 1989, at 11:22 a.m.

3. Pertinent portions of the Application were published in the Missoulian, a newspaper of general circulation in the area of the source, on February 7, 1990.

4. The Applicant proposes to appropriate up to 320 acre-feet of the waters of Butler Creek at a point in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 3, Township 13 North, Range 20 West, for irrigation purposes and 3.4 acre-feet at a point in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ of said Section 3, for stock watering purposes. The proposed places of use for irrigation are 70 acres in the SE $\frac{1}{4}$ and 55 acres in the NE $\frac{1}{4}$ of Section 4; 25 acres in the W $\frac{1}{2}$ W $\frac{1}{2}$ NW $\frac{1}{4}$ and 10 acres in the W $\frac{1}{2}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 3, all in Township 13 North, Range 20 West, Missoula County. The proposed place of use for the stock water is the N $\frac{1}{2}$ of said Section 3. The proposed period of use for irrigation is February 1 through June 1, inclusive of each year. The proposed period of use for stock watering is January 1 through December 31, inclusive of each year. The proposed period of appropriation for both uses is from January 1 to December 31, inclusive of each year. (Testimony of Applicant and Michael McLane, Department file, Objectors' Proposed Finding of Fact I and IIB, and Applicant's Statements of Fact 12, 14, and 15.)

5. The amount of flow rate to be appropriated is not known and will not be known until after the Permit (if granted) has been in use and that use verified by the Department. That portion, item 9, of the Application lists the flow rate as "runoff". This was accepted by the Department because the highest amount of runoff in Butler Creek is not known and Ap-

plicant indicated he would like to appropriate all available water from February 1 through June 1, inclusive of each year, for the proposed irrigation project. (Testimony of Michael McLane and Department file.)

6. Applicant and Betty Deschamps have owned and operated the Deschamps Ranch for a combined period of forty years. Applicant and his predecessors have historically, since 1865, used the waters of Butler Creek for irrigation of virtually the same area, using the same delivery system and method of operation, however, Applicant failed to file a timely Statement of Claim before the Water Court for that use. Section 85-2-226, MCA, states, "The failure to file a claim of an existing right as required by 85-2-221 establishes a conclusive presumption of abandonment of that right." For that reason, Applicant filed the instant Application with the Department. This Application has a priority date of June 1, 1989. Applicant did file a late Statement of Claim No. W211516-76M on September 30, 1985. (Testimony of Applicant, Applicant's Statements of Fact 13, 15, 16, 17, and 21, Objectors' Finding of Fact IIB, and testimony of Douglas Miller.)

7. Butler Creek originates in the Rattlesnake Mountains as spring flow from Belt series bedrock and its thin colluvial soil cover. The main stem of Butler Creek flows southwesterly approximately 10 miles to Interstate 90, then beneath the highway, past the county airport, then approximately two miles to dis-

charge into the Grass Valley French Ditch¹. Applicant is the last water user of Butler Creek water before the creek flows into the Grass Valley French Ditch. (Applicant's Exhibits 2, 4 and 5, Applicant's Statements of Fact 1 and 2, testimony of Applicant.)

During the winter months, Butler Creek has a steady base flow of 350 to 360 gallons per minute (gpm). Beginning with the first snow melt runoff, which may occur as early as late January or early February, stream flows increase dramatically. A peak stream discharge of 2800 gpm was observed on April 7, 1986. Peak runoff is variable and may occur at any time during the spring. There may be several peak flows. As the seasons progress, the water level in Butler Creek drops until, in some areas, there is no surface flow, however, there are some subsurface flows. (Applicant's Exhibit 2, Applicant's Statement of Fact 5, and testimony of Barry Dutton, Applicant, Betty Deschamps and Douglas Miller.)

Approximately 30 to 50 percent of the flow of Butler Creek disappears on Objector's property as the water flows over a shallow bedrock aquifer into a deep alluvium aquifer. The water again surfaces downstream as creek flow or springs as the clay forces some of the water back to the surface. (Testimony of Barry Dutton.)

¹The Grass Valley French Ditch is not used to distribute the waters of Butler Creek. Its source of supply is Clark Fork River.

The only recorded data pertaining to Butler Creek flows is the Wittingham Report. (Applicant's Exhibit 2, Applicant's Statement of Fact 6, and testimony of Barry Dutton.)

8. Objectors have filed Statement of Claim No. W045422-76M with the Water Court, claiming a priority date of 1886, however, during the processing of this claim, the priority date was identified as 1865 and the Temporary Decree reflects December 31, 1865, as the priority date. On March 22, 1988, Objectors filed an Application for Change of Appropriation Water Right with the Department to change one point of diversion and a portion of the place of use of this Water Right Claim for Butler Creek waters. The Application for Change was granted with certain terms, conditions, and restrictions. One of Objectors' points of diversion is located approximately three miles north and upstream from the Applicant's proposed project, the other is approximately two miles upstream. (Department records, Applicant's Exhibits 4 and 5, testimony of Paul Allen Hanson, Applicant's Statements of Fact 2, 4, and 20, and Objectors' Finding of Fact IIIId.)

9. During the proposed period of use, there is sufficient water in Butler Creek to serve the needs of the Applicant and the Objectors, whether the Objectors are using their new sprinkler system or revert to the historical flood irrigation use. During the high runoff periods there is more water than can be put to beneficial use by both the Objectors and the Applicant.

(Applicant's Statements of Fact 7, 8, and 22, Objectors' Finding

of Fact IIIa, and testimony of Applicant, Nancy Deschamps, Betty Deschamps, Barry Dutton, Douglas Miller, and Paul Allen Hanson.)

10. Applicant has a reservoir constructed in the Butler Creek channel. There is a 12 inch pipe with a headgate in the dam; there is also a 24 inch pipe near the crest of the dam. Applicant has also excavated a channel around the dam for use as an emergency spillway. The water flows by gravity from the dam in southwesterly direction until it converges with the Grass Valley French Ditch. The Applicant holds Permit No. 66808-76M for the reservoir and the use of 130 acre-feet of water per year. Since the instant Application requests water to be used from February 1 through June 1, the period of runoff when water flows through or around the dam, the dam is not considered the point of diversion. The proposed point of diversion, located in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 3, Township 13 North, Range 20 West, is a headgate on a 36 inch diameter pipe which extends through the irrigation ditch bank to divert the Butler Creek water. (Department file, Applicant's Statement of Fact 3, and testimony of Applicant.)

11. The proposed place of use for irrigation is located on the west side of the irrigation canal. Early in the year, before the Grass Valley French Ditch has water in it, a temporary ditch is constructed by moving soil to make dikes which prevent Butler Creek water from entering the Grass Valley French Ditch. This action not only provides irrigation for the Applicant, it allows the Grass Valley French Ditch to be cleaned while Applicant

diverts the water. The water is conveyed from the point of diversion to the place of use by contour ditches with portable gates and dams. (Testimony of Applicant, Douglas Miller, Applicant's Statement of Fact 17, and Department file.)

12. The proposed place of use for stock watering purposes is a part of the Grass Valley French Ditch which lies in the N $\frac{1}{2}$ of Section 3, Township 13 North, Range 20 West, in Missoula County. Stock have traditionally used Butler Creek for watering throughout the year establishing exempt water rights for that purpose, however, an exempt right cannot be established for stock water use from a ditch, therefore Applicant has included that use in this Application. (Department file and testimony of Applicant.)

13. Objectors offered no evidence to support their allegation that Applicant could adversely affect their prior water right nor did they offer any evidence concerning the amount of water flowing in Butler Creek during the proposed period of appropriation. When asked how the proposed project would adversely affect the Objectors, Paul Allen Hanson was unable to explain how he thought this might be possible. There were several comments from the Objectors that they did not want to be in the position where the Applicant would be able to dictate when the Objectors could use their water, however, there was no evidence to substantiate these comments. (Applicant's Statement of Fact 19 and 20.)

14. There are no other planned uses or developments for which a permit has been issued or for which water has been reserved.

Based upon the foregoing Findings of Fact and upon the record in this matter, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or rule have been fulfilled, therefore, the matter was properly before the Hearing Examiner.

2. The Department has jurisdiction over the subject matter herein, and all the parties hereto.

3. The Department must issue a Beneficial Water Use Permit if the Applicant proves by substantial credible evidence that the following criteria set forth in § 85-2-311(1) and (4), MCA, are met:

(a) there are unappropriated waters in the source of supply at the proposed point of diversion:

(i) at times when the water can be put to the use proposed by the applicant;

(ii) in the amount the applicant seeks to appropriate; and

(iii) during the period in which the applicant seeks to appropriate, the amount requested is reasonably available;

(b) the water rights of a prior appropriator will not be adversely affected;

(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(d) the proposed use of water is a beneficial use;

(e) the proposed use will not interfere unreasonably with other planned uses or

developments for which a permit has been issued or for which water has been reserved; and

(f) the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

...

(4) To meet the substantial credible evidence standard in this section, the applicant shall submit independent hydrologic or other evidence, including water supply data, field reports, and other information developed by the department, the U.S. geological survey, or the U.S. soil conservation service and other specific field studies, demonstrating that the criteria are met.

4. The proposed use, irrigation, is a beneficial use of water. See §85-2-102(2)(a), MCA.

5. The proposed means of diversion, construction, and operation of the appropriation works are adequate. See Findings of Fact 6, 10, and 12.

6. Applicant has possessory interest in the proposed place of use. See Finding of Fact 6.

7. The proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved. See Finding of Fact 14.

8. There are unappropriated waters in the source of supply at the proposed point of diversion, at times when the Applicant proposes to put those waters to beneficial use. The water is available in the amount requested throughout the proposed period of use. See Findings of Fact 6, 7, 9, 10, and 12.

There is substantial evidence that the period of appropriation for the irrigation use would be from February 1 to

June 1, inclusive of each year instead of the proposed January 1 to December 31. See Findings of Fact 4, 5, and 10.

Although Objectors insisted several times there are no unappropriated waters in Butler Creek, several witnesses including the Objectors testified there is snow melt from the mountains that infuses Butler Creek with substantial quantities of water which exit the Objectors' property and flow into the Applicant's property. Since there are no appropriations of Butler Creek water downstream from the Applicant, this water is available for appropriation.

9. There is substantial credible evidence that the water rights of prior appropriators will not be adversely affected. See Findings of Fact 8, 9, and 13.

The Objectors' points of diversion are upstream from the Applicant's proposed point of diversion. The Objectors have an 1865 priority date for their water right while a Permit issued for the Applicant's proposed project would have a 1989 priority date, it is virtually impossible for the Applicant to adversely affect the Objectors' prior water right.

WHEREFORE, based on the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Application for Beneficial Water Use Permit No. 71324-76M is hereby granted to Charles M. Deschamps to appropriate 320 acre-feet per year of the waters of Butler Creek

by means of a headgate at a point in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 3, Township 13 North, Range 20 West, for irrigation purposes and 3.4 acre-feet of water a point in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ of said Section 3, for stock watering purposes. The places of use for irrigation shall be 70 acres in the SE $\frac{1}{4}$ and 55 acres in the NE $\frac{1}{4}$ of Section 4; 25 acres in the W $\frac{1}{2}$ W $\frac{1}{2}$ NW $\frac{1}{4}$ and 10 acres in the W $\frac{1}{2}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 3, all in Township 13 North, Range 20 West, Missoula County. The place of use for the stock water is the N $\frac{1}{2}$ of said Section 3. The period of appropriation and use for irrigation shall be February 1 through June 1, inclusive of each year. The period of appropriation and use for stock watering shall be January 1 through December 31, inclusive of each year.

A. This permit is subject to all prior and existing water rights, and to any final determination of such rights as provided by Montana law. Nothing herein shall be construed to authorize appropriations by the Permittee to the detriment of any prior appropriator.

B. The Permittee shall keep a written record of the flow rate and volume of all waters diverted from Butler Creek, including the period of time, and shall submit said records to the Department upon request. The Permittee must be able to admeasure the water used from Butler Creek separate from the water used from the Grass Valley French Ditch. This condition is being applied to this permit until quantification through permit verification occurs. Upon verification of this Permit, the

greatest amount of flow rate diverted will be placed on the Applicant's water right.

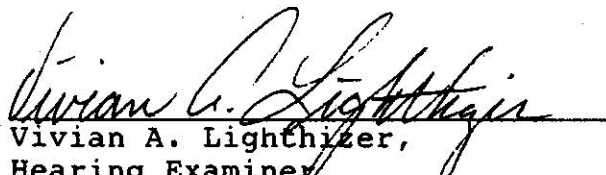
C. Issuance of this Permit shall not reduce the Permittee's liability for damages caused by the exercise of this Permit, nor does the Department, in issuing the Permit, acknowledge any liability for damages caused by the exercise hereof even if such damages are a necessary and unavoidable consequence of same.

NOTICE

This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions with the Hearing Examiner. The exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Parties may file responses to any exception filed by another party within 20 days after service of the exception. However, no new evidence will be considered.

No final decision shall be made until after the expiration of the time period for filing exceptions, and due consideration of timely exceptions, responses, and briefs.

Dated this 23rd day of January, 1991.


Vivian A. Lighthizer,
Hearing Examiner
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6625

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record at their address or addresses this 23rd day of January, 1991 as follows:


Charles M. Deschamps
8150 Mullan Road
Missoula, MT 59802

Paul A. and Natalie L. Hanson
and Paul Allen Hanson
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8255 Butler Creek
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